No. 92-929

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA, on behalf of itself, and all others similarly situated,
Petitioner,

v.

ROBERT R. DAVILA, Assistant Secretary, Office of Special Education and Rehabilitative Services, United States Department of Education,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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AMICI CURIAE BRIEF OF THE CALIFORNIA DEPARTMENT OF EDUCATION AND THE NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS IN SUPPORT OF PETITIONER METROPOLITAN SCHOOL, ET AL.

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QUESTION PRESENTED

Is there any basis, in law, education, or common sense, which supports Respondent's interpretation of the Individuals with Disabilities Education Act (IDEA) requiring states and schools to continue educational services in cases of expulsion even when there was no causal relationship between the student's disability and the conduct?

INTEREST OF AMICI

This brief amici curiae is respectfully submitted pursuant to Supreme Court Rule No. 36. Consent to the filing of this brief has been granted the California Department of Education (CDE) by counsel for all parties. The letters of consent have been lodged with the Clerk of this Court.

The California Department of Education has been on record, since May of 1990, soon after the publication of Respondent's letter to Dr. Frank New, Ohio State Special Education Director, strongly opposing Respondent's contention that the Individuals with Disabilities Education Act requires local educational agencies (LEAs) to continue providing special education instruction and related services to students who are appropriately expelled from school. Bill Honig, California Superintendent of Public Instruction, and the California Department of Education respectfully submit that neither this Court's decision in *Honig v. Doe*, 484 U.S. 308 (1988), nor the IDEA supports Respondent's interpretation. Respondent's interpretation, moreover, is educationally illogical.

Another organization, the National Association of Secondary School Principals (NASSP), has asked to join the California Department of Education in its support of the petition for writ of certiorari.[1] NASSP is a voluntary association of approximately 43,000 administrators of public and private schools throughout the United States. NASSP was organized in 1916 to aid in the improvement of educational programs for students enrolled in these schools and to provide a spokesman for secondary school administrators on matters of education policy.

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[1] This request was made on December 15, 1992, the day before this brief was scheduled to go to the printer. Given the printer's schedule, the winter holidays, and a December 30, 1992, filing deadline, there was no time to secure additional written consent from the parties.

ARGUMENT

THE *HONIG v. DOE* DECISION DOES NOT SUPPORT THE RESPONDENT'S INTERPRETATION THAT POST-EXPULSION SPECIAL EDUCATION SERVICES ARE MANDATED

Superintendent Honig, when fashioning the questions he wished the Supreme Court to address in *Honig v. Doe, supra,* did not have post-expulsion special education services in mind. In his petition for writ of certiorari, he asked that only two issues be addressed: (a) the authority of local school administrators to unilaterally remove an exceptionally dangerous student from his or her current special education placement, without parental consent, and in lieu of the "stay put" provision in 20 U.S.C. § 1415(e)(3); and (b) whether 20 U.S.C. § 1414 could be reasonably construed to mean that a state educational agency must provide direct services to an individual special education student when a local school district fails to do so.

Despite the fact that the United States Court of Appeals for the Ninth Circuit, in *Doe v. Maher,* 793 F.2d 1470, 1482 (9th Cir. 1986), ruled that post-expulsion services are not required, counsel for Doe did not petition the Supreme Court to review this ruling. This is born out by Justice Brennan's characterization of the two central issues before the Court:

> Today we must decide whether in the face of this statutory prescription state or local school authorities may nevertheless unilaterally exclude disabled children from the classroom for dangerous or disruptive conduct growing out of their disabilities. In addition, we are called upon to decide whether a district court may, in the exercise of its equitable powers, order a state to provide educational services directly to a disabled child when the local agency fails to do so.

Honig, 484 U.S. at 308.

Respondent, however, in an attempt to justify his position in the New Letter, referred to the following portions of Justice Brennan's decision as a partial basis for his disputed assertions:

> Our conclusion that Sec. 1415(e)(3) means what it says does not leave educators hamstrung. The Department of Education has observed that, "[w]hile the [child's] placement may not be changed [during any complaint proceeding], this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others . . ." More drastically, where a student poses an immediate threat to the safety of others, officials may temporarily suspend him or her for up to ten school days.
>
> This authority, which respondent in no way disputes, not only ensures that school administrators can protect the safety of others by promptly removing the most dangerous of students, it also provides a 'cooling down' period during which officials can initiate IEP review and seek to persuade the child's parents to agree to an interim placement. And in those cases in which the parents of a truly dangerous child adamantly refuse to permit any change in placement, the 10-day respite gives school officials an opportunity to invoke the aid of the courts under § 1415(e)(2), which empowers courts to grant any appropriate relief.

Id. at 325-326. (Emphasis added.)

Neither of these two passages is even remotely related to the provision of post-expulsion special education services. From amici's reading of the New Letter, Respondent apparently believes that Justice Brennan meant that educators are not "hamstrung" from providing post-expulsion services to an expelled special education student. However, this makes no sense. Justice Brennan's meaning is abundantly clear: that educators will not be "hamstrung" by the Court's decision, because they still have administrative options when a student "poses an immediate threat to the safety of others." He also explained that school officials can suspend such students for a limited period of time, and that in cases in which parents of a "truly dangerous child adamantly refuse to permit any change in

placement," they have the added option of invoking the aid of the courts under § 1415(e)(2), which "empowers courts to grant any appropriate relief." *Id.* at 326.

A fair reading of the Court's opinion demonstrates that *Honig v. Doe* was not about post-expulsion educational requirements. Respondent's endeavor to construe *Honig* to the contrary is groundless.

THE IDEA AND ITS LEGISLATIVE HISTORY PROVIDE NO JUSTIFICATION FOR RESPONDENT'S INTERPRETATION

Respondent's reliance on the IDEA and its legislative history has no merit. He bases much of his theory on the following language in *Mills v. Board of Education,* 348 F.Supp. 866 (D. D.C. 1972):

> No child eligible for a publicly-supported education in the District of Columbia public schools shall be excluded from a regular public school assignment by a rule, policy, or practice of the Board of Education . . . or its agents unless such child is provided:
>
> (a) adequate alternative educational services suited to the child's needs, which may include special education or tuition grants and,
>
> (b) a Constitutionally adequate prior hearing and periodic review of the child's status, progress, and the adequacy of any educational alternative. S. Rep. No. 168 at 6.

This language is not determinative. The fundamental public policy issue which both *Mills* and Congress addressed concerned the historic and wholesale discriminatory exclusion of handicapped children whose behavioral problems were a manifestation of their handicapping condition. At this point in time (the early 1970s), **unfettered equal access to public education** was the critical issue, not the intricacies of expulsion procedures or the ongoing educational requirements subsequent to expulsion.

As Justice Brennan indicated in *Honig v. Doe,* 484 U.S. at 324, *Mills* "demonstrated the extent to which schools used disciplinary measures to

bar children from the classroom." He also stated that school officials had been labeling students as behavioral problems and "had excluded them from class without providing any alternative education to them or any notice to their parents." *Ibid.* Congress responded to this problem by requiring LEAs to educate all handicapped children regardless of their disability. 20 U.S.C. § 1400(c).

Respondent cannot reasonably enlarge the scope of the fundamental issues, and rulings in *Mills* cannot be inappropriately enlarged to include substantive mandates concerning post-expulsion educational services. Congress' reliance on the language in *Mills* was intended to focus the country's attention on the fact that these children must be included in all aspects of public education. Respondent's dependence on *Mills,* to construe the IDEA with respect to post-expulsion services, is meritless.

In addition, Congress has never included disciplinary procedures in the IDEA. The only such reference is its implementing regulations at 34 CFR §300.513, Comment:

> Reg. 300:513 does not permit a child's placement to be changed during a complaint proceeding, unless the parents and agency agree otherwise. While the placement may not be changed this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.[2] (Emphasis added.)

There has been an abundance of litigation concerning discipline during the last 12 years. This is because neither the statute nor its regulations have given local and state officials sufficient guidance in these matters. Justice Brennan noted that in situations in which Congress' intentions may have been ambiguous, the courts may defer to the construction of an administrative agency. *Honig v. Doe,* 484 U.S. at 325 n. 8. However, since the IDEA has never explicitly referred to either expulsion or discipline, it must be concluded that Congress' silence has been unambiguous. Under these circumstances, Respondent did not have the authority to construe the IDEA as it did in the New Letter.

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[2] Expulsion, i.e., the cessation of educational services, has been a "normal" and traditional option for students who are endangering themselves or others.

THE NINTH CIRCUIT'S RULING AFFIRMING CESSATION OF EDUCATIONAL SERVICES UPON A PROPER EXPULSION IS THE MOST AUTHORITATIVE OF ALL RULINGS ON THE ISSUE AND SHOULD BE GIVEN GREAT WEIGHT BY THIS COURT

Superintendent Honig considered the permanent injunction against the California Department of Education, *Doe v. Maher*, No. C-80-4270 MHP (N.D.Cal., 1984), to be overbroad and beyond the scope of the IDEA, and appealed it to the 9th Circuit. The 9th Circuit, in addition to overruling the lower decision in part, ruled that the expulsion of a special education student does not violate the IDEA and that *an LEA has the right to withhold services from a student who has been expelled.*

> When a child's misbehavior does not result from his handicapping condition, there is simply no justification for exempting him from the rules, including those regarding expulsion, applicable to other children. Therefore, when a handicapped child is properly expelled, the school district may cease providing all educational services—just as it could in any other case. To do otherwise would amount to asserting that all acts of a handicapped child, both good and bad, are fairly attributable to his handicap. We know that that is not the case.

Doe v. Maher, 793 F.2d 1470, 1482 (9th Cir. 1986), aff'd and modified sub nom., *Honig v. Doe*, 484 U.S. 305 (1988).

While other courts have held differently, the ruling in *Doe v. Maher* is the only one which provides an analytical basis for its support. The first federal appeals court decision which rejected cessation was *S-1 v. Turlington*, 635 F.2d 342, 348 (5th Cir. 1981), which has been favorably cited by each of the other courts.[3] However, *Turlington* and its progeny deserve little attention for three reasons:

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[3] *Kaelin v. Grubbs*, 682 F.2d 595 (6th Cir. 1982), *Bd. of Education, City of Peoria v. Illinois State Bd. of Educ.*, 531 F.Supp. 148 (C. D., Ill. 1982), *Lamont v. Quisenberry*, No. C-1-84-1417, slip op. at (S.D. of W. Div. Ohio 1985), and *Doe v. Rockingham*, 658 F.Supp. 403 (W.D. Va. 1987).

(a) it is doubtful that the Court in *Turlington* had jurisdiction over the cessation issue, because the issue had never been raised by the parties;[4]

(b) none of the decisions included grounds or analyses with which to support their rejection of cessation; and

(c) inasmuch as "expulsion" is commonly defined as the denial of rights or privileges, it is contradictory to affirm expulsion as a proper disciplinary tool, as did *Turlington*, and then simultaneously reject the cessation of services. *Id.* at 270.

As the 9th Circuit implied in *Doe v. Maher*, 793 F.2d at 1482, it is legally and educationally illogical to allow an LEA to expel a student and to then require it to, nevertheless, educate the student.

PUBLIC POLICY DOES NOT SUPPORT THE CONTINUATION OF EDUCATIONAL SERVICES TO HANDICAPPED STUDENTS WHO HAVE BEEN EXPELLED FOR REASONS UNRELATED TO THEIR HANDICAP

Amici are aware of no federal case which has construed the IDEA to mean that a special education student *cannot* be expelled, as long as the student is afforded administrative due process. The purpose of an expulsion (under typical circumstances) is to remove a student from public education who is either disruptive of the educational process or imminently dangerous to himself, herself, or others. The public policy advanced by an expulsion is, essentially, to maintain a safe school environment and to provide the expelled student with a painful, but memorable lesson regarding self-control and the "law of natural consequences."

When it is determined that a special education student's misconduct is not a manifestation of the student's disability and the student's individualized educational program was appropriate, the student, for purposes of schoolwide disciplinary procedures, should be treated as a general education student (unless the student invokes administrative review of

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[4] The Statement of Issues set forth by the Court does not include cessation as an issue. 635 F.2d at 268.

this determination). If either the parents or a state hearing officer agrees with the determination that a student's misconduct is not a manifestation of the disability, the state's regular expulsion and post-expulsion procedures apply. *Doe v. Maher*, 793 F.2d at 1482.

The legislative history of the IDEA neither states nor implies that special education students are entitled to more rights than their general education counterparts. Special education students are entitled to a free appropriate public education. They are entitled to an instructional program designed by an interdisciplinary team, which includes their parents, to meet their unique educational needs. But when a special education student commits an offense which is deserving of expulsion, which means that the misconduct was found to be egregious and not a manifestation of his or her disability, the student, for post-expulsion purposes, should pay the same price as any other student in the school.

When fair administrative procedures are applied to expulsions of all students regardless of their disability or other special circumstances governed by law, such processes should neither be struck down by the courts nor regulated in accordance with the whims of any government bureaucracy.

CONCLUSION

The petition for writ of certiorari should be granted; and, thereafter, the opinion of the court of appeals reported at 969 F.2d 485 should be reversed.

Dated: December 16, 1992

Respectfully submitted,

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